

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

**In the Matter of the Commission, on its    ) Application No. PI-73/911-004**  
**Own Motion, Seeking to Investigate        )**  
**Enhanced 911 Surcharges Collected by    )**  
**Wireless Carriers.                                )**

**COMMENTS OF AT&T WIRELESS SERVICES, INC.**

By Order Opening Docket entered September 3, 2003, the Nebraska Public Service Commission ("Commission") initiated the present docket seeking comments on the following issues:

- a. Should the State provide cost recovery to a wireless carrier if it is already seeking cost recovery directly from its customers?
- b. Should the Commission adopt a policy that wireless carriers collecting surcharges for E911 services must first account to the Commission before being approved for money from the Enhanced Wireless 911 Fund?

AT&T WIRELESS SERVICES, INC. ("AT&T Wireless") hereby respectfully submits its comments on these issues.

**A.     Background**

**1.     Nebraska E911 Surcharge**

Under Nebraska's Enhanced Wireless 911 Services Act (Neb. Rev. Stat. §§ 86-442 to 86-469), wireless carriers must collect a surcharge of up to a statutory maximum of \$0.50 per wireless phone line as determined by the Commission. Neb. Rev. Stat. §§ 86-457, 86-458. The surcharge must appear as a separate line item charge on the subscriber's bill, labeled as "Enhanced Wireless 911 Surcharge" or a reasonable abbreviation of that phrase. *Id.*, § 86-457. The current surcharge required is \$0.50 per month per line. Revenues derived from the surcharge

are remitted to the Commission for the benefit for the Enhanced Wireless 911 Fund. *Id.*, § 86-459.

Moneys in the Enhanced Wireless 911 Fund may be used to fund the following:

- costs incurred or to be incurred by public safety answering points (PSAPs) to implement wireless 911 service, including, but not limited to, purchases of new equipment, costs of upgrades, modification and personnel training used to process the data elements of wireless E911 service, and maintenance costs and license fees for new equipment;
- costs incurred or to be incurred by PSAPs and to purchase, install, maintain, and operate telecommunications equipment and telecommunications services required for the provision of enhanced wireless 911 service;
- costs incurred or to be incurred by wireless carriers to implement enhanced wireless 911 (E911) service pursuant to a service agreement with or a request for service from a PSAP (which may include the portion of the costs for new equipment used for providing wireless E911 service; costs to lease another vendor's equipment or services to provide wireless E911 service; costs to create or maintain any database or database elements used solely for wireless E911 service; and other costs of establishing wireless E911 service); and
- expenses incurred by members of the Enhanced Wireless 911 Advisory Board.

*See* Neb. Rev. Stat. § 86-465(2). *Id.*

In consultation with the Enhanced Wireless 911 Advisory Board, the Commission must establish eligibility standards and criteria for fund disbursement applications and concerning the level of fund disbursement for each application. Neb. Rev. Stat. § 86-465(2).

Significantly, although wireless carriers are required to implement wireless E911 service and are required to collect the \$0.50 per month wireless E911 surcharge from their subscribers, wireless carriers have no assurance that they will receive any portion of the surcharge revenues to

fund the implementation of wireless E911. Indeed, no wireless carrier is guaranteed *any* recovery of the costs that it incurs to implement wireless E911 service in Nebraska. *See id.*, §§ 86-465(2), 86-466. Revenues derived from the \$0.50 per month per subscriber wireless E911 surcharge also must fund PSAP E911 implementation and the expenses of the E911 Advisory Board members, as determined by the Commission. *See id.*, §§ 86-465(2), 86-466.

## **2. Regulatory Programs Fee (RPF)**

AT&T Wireless is required to make substantial and very costly changes to its network as a result of federally mandated programs, which not only include E911 service,<sup>1</sup> but also include local number portability<sup>2</sup> and number pooling.<sup>3</sup> The costs (a large portion of which are up-front costs) to comply with these mandates are significant; AT&T Wireless anticipates that its

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<sup>1</sup> As the Commission is aware, FCC rules require commercial mobile radio service (CMRS) providers, like AT&T Wireless, to make E911 services available. CMRS providers are required to take actions on a phased basis enabling them to relay a caller's automatic number identification and location.

Phase I deployment requirements mandated that by March 31, 1998, CMRS providers be capable of relaying to public safety agencies the callback number (known as Automatic Number Identification or ANI) of any wireless caller, as well as the location of the cell site where the 911 call originated.

In Phase II, beginning October 1, 2001, wireless carriers are required to provide Automatic Location Information (ALI) for the 911 caller – essentially an approximation of the caller's actual location - to the public safety agency, if requested to do so by the public safety agency.

CMRS providers may use either network or handset-based technologies to provide the approximation of the caller's actual location. E911 service must be made available to users with speech or hearing disabilities. Finally, wireless handsets capable of receiving analog signals, when operating in the analog mode, must be able to complete 911 calls using the strongest analog signal available to the caller, even if the caller does not subscribe to the carrier providing the strongest signal. *See generally* 47 C.F.R. § 20.18.

<sup>2</sup> FCC local number portability ("LNP") rules will enable customers to migrate their landline and CMRS telephone numbers from one service provider to another service provider. Cellular and PCS carriers are required to comply with the LNP requirements by November 24, 2003. *See generally* 47 C.F.R. §§ 52.21-52.33. Although many carriers, including AT&T Wireless, have objected to the FCC's LNP mandate, AT&T Wireless has taken the necessary steps, and has already incurred substantial costs, to comply with the requirement.

<sup>3</sup> FCC number conservation rules require that carriers in the top markets be capable of sharing blocks of 10,000 numbers among themselves in blocks of 1,000 numbers. This is commonly known as "thousands-block number pooling"). CMRS carriers in the top 100 markets were required to be capable of pooling in this manner as of November 26, 2002, and all other CMRS carriers must be able to support roaming on their systems by users with pooled numbers. *See generally* 47 C.F.R. § 52.20. Further deployment activities are necessary, and there are ongoing administrative costs as well.

compliance costs for these items will easily reach hundreds of millions of dollars during the coming years.<sup>4</sup>

To help fund AT&T Wireless' compliance with these government-mandated programs, earlier this year AT&T Wireless began charging a Regulatory Programs Fee ("RPF"). The RPF is a recurring monthly charge of \$1.75 per wireless phone line.<sup>5</sup> The RPF appears as a separate line item, titled "Regulatory Programs Fee", in the Monthly Service Charge section of a customer's wireless invoice to make clear that the fee is not a tax or fee imposed by any government entity.

Customers are fully notified of the RPF. AT&T Wireless' printed advertisements containing calling plan price information include information regarding the RPF, as do the various calling plan brochures available at the point of sale.<sup>6</sup> Information regarding the RPF is also contained in AT&T Wireless' General Terms and Conditions for Wireless Service, which is included in the box with the wireless phone and on AT&T Wireless' website. Similarly, when an existing customer chooses to take advantage of a promotion or other benefit (such as a new, discounted handset), a sales representative informs the customer of the applicability of the RPF. Out of contract customers were notified of the RPF by a letter sent to them before the fee was initially included on their bills.

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<sup>4</sup> CTIA (the Cellular Telecommunications & Internet Association) has estimated that the wireless industry will incur one-time costs of approximately \$900 million and annual costs of approximately \$500 million to implement LNP *alone*. See CTIA Policy Abstract, *Numbering Portability*, available at [http://www.wow-com.com/pdf/number\\_porting.pdf](http://www.wow-com.com/pdf/number_porting.pdf).

<sup>5</sup> This fee is charged to new customers, existing customers who voluntarily switch to new rate plans, and "out of contract" customers - existing customers that are not bound by a term contract.

<sup>6</sup> An example of RPF information included in collateral material and/or print ads is the following:

An additional monthly \$1.75 Regulatory Programs Fee will be added to your bill for each line of service to help fund AT&T Wireless' compliance with various government mandated programs. This is not a tax or a government required charge."

Telecommunications carriers often break out costs related to government mandates in their customers' bills. Similarly, rather than hiding the costs of these mandates in service rates, the RPF helps AT&T Wireless' customers to understand what they are paying for.

When AT&T Wireless recovers its costs of its regulatory obligations, AT&T Wireless will eliminate the RPF provided that it does not encounter any new government mandates.

**B. Discussion**

**a. Should the State provide cost recovery to a wireless carrier if it is already seeking cost recovery directly from its customers?**

AT&T Wireless is deploying technologies on both its TDMA and GSM networks to make E911 possible. Some examples of the associated costs (a substantial portion of which are up-front costs) include substantial systems planning and deployment expenses such as the costs of new network equipment, circuits to connect its network to the PSAPs' networks, and software upgrades. There are also ongoing maintenance costs, such as the costs to make new cell sites E911-compatible. The deployment of these technologies requires substantial investments, summarized in Confidential Attachment "A".

The Commission has expressed concerns regarding the potential negative impact on customers, specifically, the possibility that customers in Nebraska are paying twice for E911, once under Nebraska's wireless E911 surcharge, and again where a wireless carrier such as AT&T Wireless assesses a surcharge like the RPF. Order Opening Docket, ¶ 3. An underlying concern appears to be that where wireless carriers collect a surcharge like the RPF, wireless carriers may potentially be double-, or otherwise over-recovering the costs of implementing wireless E911 services.

AT&T Wireless respectfully submits that these concerns are unfounded. To begin with, *no* wireless carrier is guaranteed *any portion* of the revenues derived from any portion of Nebraska's \$0.50 wireless E911 surcharge, although wireless carriers must collect the surcharge from every subscriber. Even if wireless carriers obtained some portion of the revenues derived

from the E911 surcharge, by statute these revenues may also be used to fund the PSAPs' wireless E911 implementation costs, among other things. Therefore, even if wireless carriers obtained *some* portion of the revenues derived from the E911 surcharge, it is likely to be only a portion, if any, thereof.

Moreover, as demonstrated by AT&T Wireless' wireless E911 implementation cost recovery plans previously submitted to the Commission, and which are discussed in the accompanying Confidential Attachment "A",<sup>7</sup> even if AT&T Wireless was allowed to retain all of the revenues that it derived from Nebraska's \$0.50 wireless E911 surcharge for the foreseeable future, that reimbursement would still not come close to making AT&T Wireless whole as compared to the total costs that AT&T Wireless will incur to deploy wireless E911 services in Nebraska. AT&T Wireless' cost studies, summarized in Confidential Attachment "A", however, demonstrate that AT&T Wireless' costs *alone* would far exceed the \$0.50 per month E911 maximum surcharge on AT&T Wireless' customers, and also far exceed AT&T Wireless' current \$1.75 RPF. The RPF thus helps AT&T Wireless to recover its E911 costs – a significant portion of which are up-front costs - and ultimately to implement E911 in a timely manner as mandated by the FCC.

Ultimately, when AT&T Wireless recovers its costs of its regulatory obligations, AT&T Wireless will eliminate the RPF provided that it does not encounter new government mandates. The Nebraska E911 surcharge helps to reach this goal.

Accordingly, the State should allow wireless carriers to recover their E911 implementation costs from the State Enhanced Wireless 911 Fund, notwithstanding any fee such as the RPF which wireless carriers may assess on their customers.

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<sup>7</sup> Under Neb. Rev. Stat. § 86-467, information provided by wireless carriers to the Enhanced Wireless 911 Advisory Board or to the Commission pursuant to the Enhanced Wireless 911 Services Act may be treated as records which may be withheld from the public upon request of the party submitting such records if the information qualifies under subdivision (3) of § 84-712.05.

**b. Should the Commission adopt a policy that wireless carriers collecting surcharges for E911 services must first account to the Commission before being approved for money from the Enhanced Wireless 911 Fund?**

Under Neb. Rev. Stat. § 86-466(2), each entity that receives disbursements from the Enhanced Wireless 911 Fund must make a “full accounting” of the money received from the Fund. This accounting should be sufficient to allow the Commission to verify that any moneys received by a wireless carrier from the E911 Fund have been expended only for authorized E911 expenses in Nebraska. No further accounting should be necessary.

To the extent that the Commission may be contemplating requiring that a wireless carrier account to the Commission for moneys it derives from a fee such as the RPF, this would be tantamount to regulation of the fee itself. Under section 332(c)(3)(a) of the Federal Communications Act, states do not have “any authority” to determine the structure or reasonableness of commercial mobile radio service (“CMRS”) rates. 47 U.S.C. § 332(c)(3)(A). A fee such as the RPF clearly constitutes a “rate” within the meaning of section 332(c)(3)(A). The FCC has held that the statute broadly prohibits state regulation of any aspect of the “rates charged by” CMRS providers, which “include[s] both rate levels and rate structures”:

[W]e find that the term “rates charged” in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also **may not prescribe the rate elements for CMRS** or specify which among the CMRS services provided can be subject to charges by CMRS providers.

*In re Southwestern Bell Mobile Sys., Inc.: Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 F.C.C.R. 19898 20 (1999) (emphasis added).

Thus, section 332(c)(3)(A) prohibits any state action that seeks to define or to limit the elements that may make up a CMRS provider’s rate structure. As the FCC has acknowledged, wireless rate structures have numerous components:

For mobile radio services, price is a complicated factor....[C]ellular prices have at least three main elements. These are monthly access, per minute peak-use period, and per minute off-peak-use period charges. In addition, there may be fees for activation, termination, and roaming. In some bundled offerings, monthly access charges are combined with a certain number of “free” minutes of usage. Further, contract length may be a factor. . . .

*In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 F.C.C.R. 8844, 8868 at 70 (1995) (emphasis added); *see also In the Applications of NYNEX And Bell Atlantic Corp., For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 F.C.C.R. 19985 (1997) (“termination charge” included in wireless “rate” for purposes of comparing wireless and wire line rates of NYNEX affiliates).

Courts have thus consistently held that the application of state law claims to various types of fees charged by wireless carriers is preempted. *See Redfern v. AT&T Wireless Services, Inc.*, Civil No. 03-206-GPM, at 1 (S.D. Ill. June 16, 2003) (“the early termination fee affects the rates charged for mobile service and, thus, Plaintiff’s challenge to the fee is completely preempted”); *Aubrey v. Ameritech Mobile Communications, Inc.*, 2002 U.S. Dist. LEXIS 15918, at \*12 (E.D. Mich. June 14 2002) (“by alleging that the rates which AMC charged for terminating a subscriber’s service were exorbitant, it is clear that the Plaintiff is challenging the rates charged by AMC for its wireless services. . . .In light of the plain language of section 332, such claims . . . are . . . expressly preempted”); *see also Gilmore v. Southwestern Bell Mobile Systems, Inc.*, 156 F. Supp. 2d 916 (N.D. Ill. 2001) (attack on reasonableness of wireless carrier’s “administration fee” preempted).

Consequently, to the extent that the Commission requires an accounting of wireless carrier fees such as the RPF as a prerequisite to obtaining E911 implementation cost recovery from the Enhanced Wireless 911 Fund, any such requirement would constitute preempted rate regulation. For this additional reason, the Commission should not (in fact, cannot) require



wireless carriers to account for moneys derived from fees such as the RPF before being allowed to recover their E911 implementation costs from the Enhanced Wireless 911 Fund.

Finally, as discussed above and in Confidential Attachment “A”, AT&T Wireless’ costs to implement E911 in Nebraska far exceed the \$0.50 per month E911 maximum surcharge established by statute, as well as its existing \$1.75 RPF; and even then, AT&T Wireless is not guaranteed that any portion of the \$0.50 E911 surcharge revenues it collects will be available to it to fund its wireless E911 implementation costs. Consequently, it should be clear that even if AT&T Wireless is assessing an RPF on its customers, concurrently recovering E911 implementation costs from the State Enhanced Wireless 911 Fund will *not* result in any over-recovery of AT&T Wireless’ E911 implementation costs. Significantly, AT&T Wireless has pledged that when it recovers its costs of its regulatory obligations, AT&T Wireless will eliminate the RPF provided that it does not encounter any new government mandates. There will be no over-recovery of these costs.

**C. Conclusion**

For the reasons discussed herein,

- ? the State should continue to allow wireless carriers to recover E911 implementation costs from the Enhanced Wireless 911 Fund notwithstanding any fee that the carrier may assess upon its customers, such as AT&T Wireless’ RPF; and
- ? the Commission should not adopt a policy requiring that wireless carriers assessing fees, such as AT&T Wireless’ RPF, must first account to the Commission before being approved for money from the Enhanced Wireless 911 Fund.

AT&T Wireless appreciates this opportunity to comment.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that an original and an electronic copy of the non-confidential version and an original of the confidential pages filed under seal of the Comments of AT&T Wireless Services, Inc., in Docket No. PI-73/911-004 were hand-delivered on this 3<sup>rd</sup> day of October, 2003 to the following:

Mr. Andrew Pollock  
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